Office-Supreme Court, U.S.
FILED
NOV 12 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 581

HARRY P. LOCKLIN AND ELMER J. BRANT, GENERAL PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF RADIANT COLOR COMPANY,

Petitioners,

vs.

SWITZER BROTHERS, INC., ROBERT C. SWITZER AND JOSEPH L. SWITZER,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BENJAMIN H. SHERMAN,
ANTHONY R. CHIARA,
53 West Jackson Boulevard,
Chicago 4, Illinois,
Attorneys for Respondents.

HILL, SHERMAN, MERONI, GROSS & SIMPSON,
53 West Jackson Boulevard,
Chicago 4, Illinois,
Of Counsel for Respondents.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

TABLE OF CONTENTS.

	PAGE
Counter-Statement of Questions Presented for Review	1
Counter-Statement of the Case	2
Argument	8
Conclusion	16

TABLE OF AUTHORITIES.

Bros, Inc. v. W. E. Grace Mfg. Co., 320 F. 2d 594, 607. 9

Fiske v. Buder, 125 F. 2d 841 (8th Cir. 1942) 11

Hazel-Atlas v. Hartford-Empire Co., 332 U. S. 271 (1944) 11

Heiser v. Woodruff (1946), 327 U. S. 726, 735..3, 8, 11, 14

Mercoid Corporation v. Mid-Continent Co. (1944), 320 U. S. 661 15

Phillipine National Bank v. Kennedy, 295 F. 2d 544-545 (D. C. Cir. 1961) 12

Precision Co. v. Automotive Co. (1945), 324 U. S. 806. 13

Shawkee Mfg. Co. v. Hartford Co. (1944), 322 U. S. 271 .....11, 14

Texts.

7 Moore, Federal Practice § 60.10 [5]-[9] (2d ed. 1955) 11

Rules.

Federal Rules of Civil Procedure Rule 60(b)..... 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 581.

HARRY P. LOCKLIN AND ELMER J. BRANT, GENERAL PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF RADIANT COLOR COMPANY,

Petitioners,

vs.

SWITZER BROTHERS, INC., ROBERT C. SWITZER AND JOSEPH L. SWITZER,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW.

1. After a District Court's judgment has been affirmed on appeal and certiorari denied, can the losing party then nullify and enjoin the enforcement of the judgment entered on the mandate and retry and review the identical issues in another District Court? Petitioners, in such attempt to relitigate identical issues, seek by an unverified, un-

supported Complaint in the Illinois District Court to enjoin the enforcement of an injunction and judgment of patent validity and infringement, entered by the District Court of California, affirmed by the Court of Appeals of the Ninth Circuit and certiorari denied in a suit between the same parties, while the accounting proceeding for damages is still in progress in the California District Court.

2. Does Rule 60 (b) of the Federal Rules of Civil Procedure create a right in a losing party to review a final judgment of a District Court, affirmed on appeal, and obtain relief from such judgment by unsupported allegations of misconduct thrice raised and determined to be without grounds by the original court? Is such an independent action barred by res judicata by the presentation of such issues to the original District Court, its findings that no grounds for such allegations of misconduct existed, and the affirmance of the District Court's action by the Court of Appeals? Did the repeated and unsuccessful attempts to make out even a prima facie case of misconduct, in the original courts, bar an independent, unsupported action based upon the same issues in another District Court?

3. Does *Heiser* v. *Woodruff* (1946), 327 U. S. 726, 735, properly construe and control the Federal Court practice under Rule 60 (b), free of what may be the California practice under the California rule?

COUNTER-STATEMENT OF THE CASE.

Petitioners (Radiant) sought in the Illinois District Court[1] by motion to file an unsupported, unverified Supplemental Counter-claim in 52 C 1198 and by an almost identical original unverified, unsupported Complaint in 62 C 1708 to enjoin respondents (Switzers) from enforcing an injunction and final judgment of patent validity and

1. Hereafter indicated as Ill. D. C.

infringement entered by the California District Court[2] and affirmed by the Court of Appeals of the Ninth Circuit,[3] certiorari denied. The Ill. D. C. dismissed the Motion in 52 C 1198 and dismissed the Complaint in 62 C 1708 on the grounds of res judicata. The Court of Appeals of the Seventh Circuit[4] affirmed the res judicata judgment and petitioners now seek a Writ of Certiorari to the C. A. 7.

In the California case, the District Court, after full trial, found the Kazenas patent No. 2,809,954, owned by respondents to be valid and infringed by petitioners (Memorandum of Court, September 4, 1959; R. App. 54-66).

Thereafter, petitioners ("plaintiffs" in Cal. D. C.) made numerous motions in unsuccessful attempts to reopen the California case, all involving alleged unclean hands or fraud. These motions are identified and summarized as follows:

(1) Motion to Dismiss Counterclaim on the ground of unclean hands (R. App. 66-67).[5]

(2) Motion to Set Aside Submission (R. App. 99-100). Both Motions (1) and (2), after briefing and an oral hearing on the combined Motions, were ordered off calendar (R. App. 100).

(3) Motion for New Trial and for Amendment of Findings of Fact, Conclusions of Law and Judgment (R. App. 118-123). This Motion was supported by opinion affidavits; both those previously filed (R. App. 69-99) in connection with Motions (1) and (2) and additional affidavits (R. App. 123-127), all having largely to do with Examples 2 and 5 of the Kazenas patent and with the post-trial

2. Hereafter indicated as Cal. D. C.

3. Hereafter indicated as C. A. 9.

4. Hereafter indicated as C. A. 7.

5. References to Appendix to Appellants' Opening Brief filed in the C. A. 7 and part of the record here shall be indicated as: R. App. .....

condition of the Kazenas patent Example 5 resin, Exhibit N. The motion, so it stated, was brought to determine whether respondents had "represented falsely to the Patent Office and to this Court" with respect to Exhibit N, with respect to inventorship by Kazenas of the MSF resin claimed in the patent in suit and with respect to the Kazenas resin being, as claimed, "substantially insoluble in aromatic hydrocarbon solvents". After consideration of affidavits, briefs and arguments (R. App. 122-157; R. D. App. 18-27)[6] and affidavit exhibits including Opposition to Motion Exhibit 10 (R. D. App. 27) the Court denied the Motion for New Trial (R. App. 157) (See also Gray affidavit, R. App. 26). The Cal. D. C. found no basis for the "fraud" charges[7] in anything submitted to it by this Motion.

(4) Motion to Remand (R. App. 157-161). The C. A. 9 denied this motion without prejudice to renew the motion at the hearing of the appeal on its merits (R. App. 169). The matters presented by the Motion to Remand were the same as were presented to the Cal. D. C. in Motions (1), (2) and (3) above (R. App. 158-160; and see Gray's affidavit, ¶ Q, R. App. 27-28).

(5) Motion to Relieve Plaintiffs from Judgment under Rule 60 (b) (R. App. 169-171). This motion was based upon allegedly newly-discovered evidence including a Monsanto-owned Anas Patent No. 2,852,489 and a Switzer-owned companion Kazenas application, that resulted in patent No. 2,938,873 and that claimed MSF pigments. Upon consideration of Affidavits (R. App. 171-216) filed by both parties, including the Switzer affidavit (R. App. 211-216),

---

6. References to the Appendix attached to Appellees' Brief in the C. A. 7 shall be indicated R. D. App. ...

7. These are the same fraud issues that were presented to the Ill. D. C. here in 52 C 1198 by Supplemental Counterclaim (R. App. 5) and in 62 C 1708 (R. App. 32).

briefs and arguments at the hearing on said motion (R. App. 216-219; R. D. App. 18), the Cal. D. C. denied the motion (R. App. 219-220), saying that in view of its conclusion that the evidence "which might be adduced upon new trial" would not alter the decision theretofore made, it was "unnecessary for the Court to pass upon the contention of the Defendant that the so-called newly-discovered evidence could have been more seasonably discovered by plaintiffs" (R. App. 220).

Petitioners appealed not only from the judgment (R. App. 116) but also from the denials of the Motion for New Trial (R. App. 118) and of the Motion to Relieve Plaintiffs from Judgment filed under Rule 60 (b) (R. App. 169). In its Statement of Points on Appeal (R. D. App. 32) and its Specification of Errors (R. D. App. 38), petitioners listed the alleged errors of the Cal. D. C. in failing to dismiss respondent's Counterclaim "because of defendant's unclean hands", in failing to take into cosideration the post-trial condition of Exhibit N, in denying petitioners' motion for new trial, in denying petitioners' motion to relieve petitioners from judgment, and in finding that the affidavits of respondents established reduction to practice by Kazenas ahead of Anas.

The Ninth Circuit Court of Appeals affirmed the judgment and rulings of the District Court in all respects (R. App. 249-266) notwithstanding petitioners' detailed and lengthy arguments in its Opening Brief on Appeal (R. D. App. 39-59) on all of these very same issues of alleged fraud and misrepresentations that petitioners here advance as justification for re-trying the California case in the Ill. D. C.

On May 2, 1962, a Writ of Perpetual Injunction was issued restraining and enjoining the petitioners from infringing claims 1 to 4 and 9 of patent No. 2,809,954, follow-

ing the same wording used in the Judgment (R. App. 116-118, ¶ 10).

With respect to the Illinois cases, both the proposed Supplemental Counterclaim (R. App. 5-19) and the Complaint (R. App. 32-47) are based upon the same allegations (R. D. App. 13). Both include a demand for an injunction enjoining respondents "from representing to the trade that said Kazenas patent No. 2,809,954 is valid and infringed and from in any way enforcing the judgment which Switzer Brothers, Inc. has obtained against Radiant Color Company" (SC ¶ 69 (a), R. App. 18 and C ¶ 75 (a), R. App. 46).

The Complaint in the Ill. D. C. in Civil Action 62 C 1708 (R. App. 32) was filed September 6, 1962 to stop the running of the Statute of Limitations as to alleged fraud (R. D. App. 7-9). Ultimately both the motion in 52 C 1198 and the complaint in 62 C 1708 were assigned to Judge Bernard M. Decker and Judge Decker was asked (R. D. App. 12-13) by counsel for respondents to rule on both "since the matters put in issue * * * are the same." Those matters are the alleged fraud and misrepresentations raised in the California case, set forth above. No antitrust violation is alleged in the proposed Supplemental Counterclaim or Complaint that is not based on the assumption that the Kazenas patent is unenforceable because of such alleged fraud and misrepresentations.

The entire record filed with the Court of Appeals of the Ninth Circuit, together with certain pleadings and briefs filed with the District Court and with the Court of Appeals in the California case (R. App. 47), was made available first to Judge Miner (R. App. 8) and then to Judge Decker. A hearing before the latter was had on May 24, 1963, at which counsel for petitioners said: "* * * now, if Your Honor rules there is *res judicata*, that is the end of our lawsuit anyway" (R. D. App. 36).

Petitioners' counsel made a similar but even more all-encompassing admission in his statement to the California District Court (R. D. App. 12):

> "* * * the courts there (meaning the courts of Illinois) can look at it [the record in the California courts] and say: You say all you are seeking to prove are things that are already litigated. If the court says that, it is going to say that you petitioners have no right to file your complaint or your supplemental counterclaim."

Judge Decker said in effect just that; he entered his Order (App. A) on August 23, 1963 denying and/or dismissing the Motion in 52 C 1198 and dismissing the Complaint in 62 C 1708 both "because of *res judicata*."

The Court of Appeals for the Seventh Circuit affirmed Judge Decker's judgment on July 24, 1964 (App. C) and concluded that the Ill. D. C. "did not err in deciding that the judgment of the California District Court, affirmed by the Ninth Circuit, is *res judicata* of the issues presented in these suits."

ARGUMENT.

Petitioners predicate their right to have this Court review the judgment below on their wholly specious assumption that mere allegations of misconduct on the part of respondents entitle petitioners to such review. Stripped of their wrappings, all of petitioners' assertions of fraud upon the Patent Office and upon the courts and of anti-trust violations on the part of respondents are nothing more than unsupported charges. All of these same charges* were fully presented to the Cal. D. C. and reviewed by the C. A. 9.

The Cal. D. C. saw no aspect of "fraud or chicanery" and thought that a new trial would merely result in the parties seeking to present "some additional experts to expound their views"; that, therefore, "it does not appear that the evidence which might be adduced on new trial would alter the decision heretofore made". (App. "B", pp. 6-7)

The C. A. 9 affirmed (App. "B", p. 7). And as the C. A. 7 correctly pointed out:

> "Once the California District Court decided there were no grounds for granting a new trial, there was no need for it to go further and decide upon the merits of the grounds urged. Since the Ninth Circuit of Appeals decided the district court did not abuse its discretion, that ended the matter. *Heiser* v. *Woodruff*, 327 U. S. 726, 736 (1945)".

That should have ended the matter. Radiant made "no further showing" in its unverified pleadings in the ac-

* Except the one that the Switzer affidavit was false, see App. "B", p. 7, fn. 5. Radiant did not even controvert that affidavit when presented to the California District Court.

tions before the Illinois courts and therefore "failed to meet substantive requirements which it must meet to seek relief from judgment" (App. "B", p. 10).

As the C. A. 9 so aptly characterized Radiant's post-trial efforts to obtain a new trial, App. "E", p. 35:

> "* * * it should be obvious that every disgruntled litigant cannot, in the name of public welfare, secure a new trial simply by charging fraud."

In bringing their actions below, petitioners sought to have the Illinois courts review and set aside the judgments of the California courts, and specifically prayed for an injunction against Switzer from representing that the patent there in suit was valid and infringed (although so held by the California courts) and "from in any way enforcing the judgment which Switzer Brothers, Inc. has obtained against Radiant Color Company" (App. "F", p. 53).

But, as the C. A. 7 held (App. "B", pp. 9-10):

> "* * * a 'foreign' federal court will not set aside a judgment in an independent equitable action, unless the judgment would be set aside on those same grounds by the 'home' federal court. *Bros, Inc.* v. *W. E. Grace Mfg. Co.*, 320 F. 2d 594, 607 (5th Cir. 1963). And here the California district court had already decided not to set aside the judgment on substantially most of the same issues as raised here."

From the foregoing alone, it is clearly evident that the judgments sought to be reviewed correctly applied the bar of *res judicata* against petitioners. Their petition for Writ of Certiorari should therefore be denied. If this Court agrees, that is the end of the matter.

All of the controlling questions presented and all of the arguments advanced in the Petition with respect thereto were fully answered and duly laid to rest by the C. A.

7. This will be apparent from the following quotations arranged in pairs with the question or point advanced by petitioners quoted first, followed by the applicable ruling of the C. A. 7 quoted from App. "B":

Petition, p. 2:

> "Relief is sought under the antitrust laws for injuries arising out of an attempt to monopolize by alleged misconduct which includes (a) the use of alleged misrepresentations before the Patent Office to obtain a patent, and (b) the use of alleged spurious physical evidence, misrepresentations, false testimony and false affidavits in an infringement action brought to secure a favorable adjudication enforcing that patent monopoly. Is a claim for that relief barred by res judicata arising out of orders, made in the exercise of judicial discretion, which denied motions made in such infringement action after trial seeking to prove up such alleged misconduct?"

C. A. 7, App. "B", pp. 11-12:

> "Radiant presented its charges three times before the California district court (the settlement of findings, motions for new trial and to vacate judgment) and again before the Ninth Circuit Court of Appeals. It was denied relief, on the same grounds it presents here.
>
> We conclude that the district court did not err in deciding that the judgment of the California district court, affirmed by the Ninth Circuit, is res judicata of the issues presented in these suits."

Petition, p. 2:

> "An independent action preserved under Rule 60(b) of the Federal Rules of Civil Procedure is brought for relief from the judgment obtained by such alleged misconduct. Is that independent action barred by res judicata arising out of such orders?"

C. A. 7, App. "B", pp. 7-8:

> "We think Rule 60(b), under the circumstances be-

fore us, provides for alternative, and not cumulative, methods of relief, and we do not think the rule should be construed to preclude, as Radiant argues, the bar of res judicata. *Heiser* v. *Woodruff*, 327 U. S. 726, 733 (1945)."

Petition, p. 3:

"Does *Heiser* v. *Woodruff* (1946), 327 U. S. 726 compel a federal court to construe Rule 60(b) contra the California rule after which Rule 60(b) was patterned?"

C. A. 7, App. "B", pp. 8-9:

"We need not—because Rule 60(b), as adopted in 1938, was patterned after a California rule—construe, as California courts have done, a denial of post-trial motions as not res judicata of a later independent action to set aside judgment on the same grounds. Although California decisions may guide us as to the scope of relief under Rule 60(b), *Fiske* v. *Buder*, 125 F. 2d 841 (8th Cir. 1942), 7 Moore, Federal Practice, § 60.10 [5]-[9] (2d ed. 1955), we are compelled by *Heiser* v. *Woodruff*, 327 U. S. 726 (1945), not to extend the California construction of the rule to the question of whether a ruling on a motion is res judicata of a later independent equitable action."

Petition, p. 5:

"In determining, that when the California District Court decided there were no grounds shown for granting a new trial, 'that ended the matter', the Court of Appeals below rendered a decision in conflict with *Shawkee Mfg. Co.* v. *Hartford Co.* (1944), 322 U. S. 271."

C. A. 7, App. "B", p. 8:

"Neither *Hazel-Atlas Co.* v. *Hartford-Empire Co.*, 322 U. S. 238 (1944), nor *Shawkee Mfg. Co.* v. *Hartford-Empire Co.*, 332 U. S. 271 (1944), has relevance to the situation before us. The question of res judicata was not at issue in either case, and the uncontradicted

facts of fraud differentiate both cases from that before us. And we do not think that footnote 5[7] of the Hazel-Atlas opinion compels our decision that in the circumstances of this case the California court was required to hear evidence in order to render res judicata denial of the motions."

Petition, p. 9:

"It is clear upon the face of the opinion of the Court of Appeals for the Ninth Circuit that the orders which were rendered in the prior case were not based upon the merits of any fraud determination but were based on nonabuse of discretion (App. E., pp. 33-36)."

C. A. 7, App. "B", p. 10:

"The ruling by the California district court was within the court's discretion and the court gave these reasons for exercising its discretionary ruling: accepting as true the charges with respect to the Patent Office, no 'aspect of fraud' was shown, and no excuse for lack of diligence; and with respect to fraud on the court, the substance of the 'newly discovered evidence' could have been discovered and used at the trial. Radiant, making no further showing in the actions before us, failed to meet the substantive requirements which it must meet to seek relief from judgment. Failed for the same reasons that the court said movant did in *Phillipine National Bank* v. *Kennedy*, 295 F. 2d 544, 545 (D. C. Cir. 1961): 'the judge who tried the case, and who was fully familiar with the evidence formerly offered, decided that plaintiff-appellant was not entitled to relief,' 295 F. 2d at 545."

Petition, p. 10.

"The judgment sought to be enjoined adversely affects the public interest. Switzer has used the tainted judgment to further its already adjudicated attempt to monopolize the daylight fluorescent materials field.

(App. F. p. 49).* The raw ingredients formerly used by Radiant and now used by Switzer in producing the patented materials are in interstate commerce and are made by third persons who are not even parties to the litigation (App. F, p. 50). The patented materials are in popular demand with large segments of the American public who are not even parties to the litigation (App. F, p. 50). The patented claims encompass larger classes of materials than those used in the resin produced by the parties and thus the seeming of a valid monopoly will tend to deter further experimentation and progress in the art (App. F, pp. 50-51). The Kazenas patent issued on October 15, 1957 (App. B, p. 5). Thus, the 17 year monopoly of the patent will remain in force for another 10 years."

C. A. 7, App. "B", p. 7:

"The Ninth Circuit Court of Appeals affirmed: the district court did not abuse its discretion 'bearing in mind both lack of diligence and the showing made with respect to fraud and the public welfare' in denying 'a new trial on the ground of unclean hands or to refuse to delay judgment in order that a hearing might be had on the newly tendered issues.' 299 F. 2d at 170. These are the issues which Radiant claims were not passed on in the California courts. There is no merit in the claim."

Petition, pp. 10-11:

"The public interest demands that Radiant be given an opportunity to rout out and to prove the allegedly fraudulent conduct of Switzer on the Patent Office, on the District Court and on the Court of Appeals. *Precision Co.* v. *Automotive Co.* (1945), 324 U. S. 806, at page 818, made an especial reference to the 'uncompromising duty' of all parties to Patent Office proceedings 'to report to it all facts concerning possible fraud or inequitableness underlying the applica-

* All references to "App. F" are to unverified allegations made by petitioners in the Ill. D. C.,—not to established facts, nor even to anything of record in the California case.

tions in issue.' *Shawkee Mfg. Co.* v. *Hartford Co.* (1944), 322 U. S. 271, at page 273, made an especial reference to the requirement that a patent owner 'should make a full disclosure of its fraudulent conspiracy' when a charge of fraud is made on the record."

C. A. 7, App. "B", p. 7:

"There is no merit either in Radiant's contention that neither California court passed on the truth of the grounds urged for a new trial. Once the California district court decided there were no grounds shown for granting a new trial, there was no need for it to go further and decide upon the merits of the grounds urged. Since the Ninth Circuit Court of Appeals decided the district court did not abuse its discretion, that ended the matter. *Heiser* v. *Woodruff*, 327 U. S. 726, 736 (1945)."

Petition, p. 12:

"*Heiser* v. *Woodruff* (1946), 327 U. S. 726, upon which the Court of Appeals based its decision (App. B, pp. 7-9), does not announce any rule in conflict with the authorities upon which Radiant here relies or upon which it did rely in the courts below."

C. A. 7, App. "B", p. 8:

"The *Heiser* case is close to the situation before us. There the Supreme Court reversed a judgment of the Tenth Circuit and held that a previous adjudication, that the judgment against a bankrupt was not procured by fraud, may not be disregarded, even though in the previous litigation the allegations of fraud were not supported by tender of evidence or other proof. 327 U. S. at 736."

The decision below does not conflict with *Mercoid Corporation* v. *Mid-Continent Co.* (1944), 320 U. S. 661. There, Mercoid was not a party to the earlier suit although it provided the defense and none of the misuse defense or

antitrust issues was ever pleaded, controverted or brought into issue in the earlier suit against a customer of Mercoid. Accordingly the court found that such facts were not *res judicata* in the later suit against Mercoid. In the instant case, the issues and facts upon which petitioners attempted to base the later suit were repeatedly raised, controverted and brought to issue in the California courts and determined to be without sufficient grounds to make even a prima facie showing.

Petitioners failed to submit any new or additional proof or grounds to the Illinois District Court.

Furthermore, in the *Mercoid* case, the patent owner was attempting to extend the scope of his patent monopoly to the sale of unpatented stoker switches. Here, respondents (Switzers) seek nothing more than the lawful patent scope adjudicated by the Cal. D. C. and C. A. 9, and petitioners (Radiant) by their suit in the Ill. D. C. are attempting to perpetuate and enhance their continued contemptuous violation of the California injunction.*

The C. A. 7 was correct in affirming the Ill. D. C.'s judgment that the Cal. D. C. judgment is *res judicata* of the issues presented in the suits.

---

* See Cal. D. C. decision of March 31, 1964 finding petitioners guilty of contempt in C. A. 36995, now on appeal to C. A. 9, Docket No. 19467.

CONCLUSION.

The Lower Court's decision should not be disturbed and the Petition should be denied.

Respectfully submitted,

BENJAMIN H. SHERMAN,
ANTHONY R. CHIARA,
53 West Jackson Boulevard,
Chicago 4, Illinois,
Attorneys for Respondents.

HILL, SHERMAN, MERONI, GROSS & SIMPSON,
53 West Jackson Boulevard,
Chicago 4, Illinois,
Of Counsel for Respondents.